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U.S. Department of Homeland Security

Citizenship and Immigration Services

ADMINISTRATIVE APPEALS OFFICE
CIS, AAO, 20 Mass, 3/F
425 Eye Street N.W.
Washington, D.C. 20536

[redacted]

File: WAC 02 094 56324 Office: CALIFORNIA SERVICE CENTER Date: JAN 14 2004

IN RE: Petitioner: [redacted]
Beneficiary:

Petition: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER: [redacted]

INSTRUCTIONS:
This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of Citizenship and Immigration Services (CIS) where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of $110 as required under 8 C.F.R. § 103.7.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a diamond wholesaler. It seeks to employ the beneficiary permanently in the United States as a diamond cleaver. As required by statute, the petition is accompanied by a Form ETA 750 Application for Alien Employment Certification approved by the Department of Labor. The director determined that the petitioner had not established that the beneficiary has the requisite experience as stated on the labor certification.

On appeal, counsel submits a brief and additional evidence.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

8 CFR § 204.5(l)(3)(ii) states, in pertinent part:

> (A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.
>
> (B) *Skilled workers.* If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

Eligibility in this matter hinges on the petitioner demonstrating that the beneficiary was eligible for the proffered position on the priority date of the petition, the date the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). Here, the request for labor certification was accepted for processing on

March 28, 1997. The labor certification states that the position requires two years of experience and that the proffered wage is $2,000 per month, which equals $24,000 per year.

With the petition counsel submitted a letter, dated June 10, 1997, purporting to be from a partner at Mani Exports in Mumbai, India. That letter states that the beneficiary worked for the company as a diamond cleaver from "APRIL-94 TO PRESENT." It further states that the beneficiary "trained about 15 workers during that employment. The alleged partner's signature is illegible. The letter contains no other legend identifying the alleged partner.

On August 28, 2002, the Director, California Service Center, issued a Notice of Intent to Deny in this matter, based upon evidence adverse to the beneficiary's employment claim received from the Vice Consul of the Consulate General of the United States of America (AmConGen), Mumbai, India. The Notice of Intent to Deny states the following:

> An investigator [of the Fraud Prevention Unit, AmConGen, Mumbai] asked the manager of Mani Export to fax them a copy of [the beneficiary's] appointment letter as well as payroll records, or any other proof that [the beneficiary] had worked for the company. The manager replied that Mani Exports had no proof that [the beneficiary] had ever worked at the company and hung up the phone.

The notice accorded the petitioner 30 days to respond.

In response, counsel submitted a letter, dated September 26, 2002, in which he stated that he was submitting (1) an affidavit from a partner of Mani Exports, (2) an affidavit from an export assistant at Mani Exports, (3) an affidavit from a diamond assorter at Mani Exports, (4) a copy of a summary of the beneficiary's salary, (5) copies of payment vouchers indicating the salary paid to the beneficiary, and (6) copies of Mani Exports payroll.

Of the documents listed by counsel, this office only received what purports to be a salary summary showing the amounts paid to "Ketan Bhai A. Patel" during each month from June 1994 to July 1997. This office notes that the employment verification submitted with the initial petition indicates that the beneficiary, who is called "Ketan Patel" on the petition, "Ketan Amrutbhai Patel" on his experience letter, and "Ketan Armut Patel" on the Form ETA 750, alleged that he commenced employment for Mani Exports during April 1994 on the Form ETA 750 Part B. However, no reason was given for omitting information pertinent

to the April 1994 to June 1994 employment period.

This office did not receive any of the affidavits referred to in counsel's September 26, 2002 letter. On November 21, 2002, the Director, California Service Center denied the petition, finding that the beneficiary's experience letter is apparently fraudulent and that the petitioner had not demonstrated that the petitioner has the requisite experience.

On appeal, counsel quotes from affidavits never received into the record of proceeding. Counsel did not provide copies of those affidavits.

According to counsel, the affidavit from an export assistant indicates that the AmConGen investigator called and, when unable to obtain the information he desired, stated he would call again. The affidavit from the diamond assorter at Mani Exports, according to counsel, indicates that he spoke to the investigator when the investigator called back. The affiant allegedly told the investigator that he, the affiant, had only worked for the company for a few months and would have to consult company records for the information the investigator wanted. According to counsel, the affidavit further stated that the affiant told the investigator that he, the affiant, knew the beneficiary had worked for the company because he knew the beneficiary. The affidavit finally stated, according to counsel, that the investigator then stated that he knew the affiant was lying and hung up.

The assertions of counsel, however, are not evidence. *Matter of Laureano*, 19 I&N Dec. 1, 3 (BIA 1983); *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). No evidence was received to support counsel's assertions.

Counsel asserts that the director erred in failing to consider the evidence submitted in response to the Notice of Intent to Deny. Counsel further asserts that, because the director failed to consider the evidence, the petitioner was not accorded an opportunity to respond as required by 8 C.F.R. § 103.2(b)(16)(1). This office reiterates that the affidavits counsel claims to have submitted are not in the record of proceeding, although the letter of September 26, 2002, to which they were allegedly appended, is present.

The current beneficiary in this matter was substituted for the original beneficiary. The original beneficiary also provided an employment experience letter, which also purports to be from Mani Exports in Mumbai, India. That letter was nearly identical to the present beneficiary's letter. Other than the date, it is the

same word-for-word, line-for-line, and space-for-space. It states that the previous beneficiary also worked from "April-94 TO PRESENT," and "trained about 15 workers." This fact indicates either a remarkable coincidence or an attempt to perpetrate a fraud on CIS. It suggests that Mani Exports is producing employment verifications for people who have never worked there. It suggests that the information in the beneficiary's employment verification was deliberately falsified.

Although this information was not included in the Notice of Intent to Deny, it is based on the two employment verification letters provided by the petitioner. As such, it is information of which the petitioner is aware, and no issue of notice exists to trigger the provisions of 8 C.F.R. § 103.2(b)(16)(1).

Further, as was stated in the Notice of Intent to Deny, a letter from the AmConGen Vice Consul in Mumbai, India states that, an official of Mani Exports indicated that the company had no records to demonstrate that the beneficiary worked for that company.

Counsel's quotes from two of the three affidavits allegedly submitted indicate that the conversation went quite differently. As was noted above, however, counsel's assertions are not evidence.

Absent any credible evidence to contradict the AmConGen investigator's finding, the remaining documentary evidence submitted by counsel--the salary summary, payment vouchers, and payroll--is unconvincing.

The evidence submitted does not demonstrate credibly that the beneficiary has the requisite two years of experience. Therefore, the petitioner has not established that the beneficiary is eligible for the proffered position.

Beyond the decision of the director, this office notes that the priority date is March 28, 1997 and the proffered wage is $24,000 annually. Although the petition was submitted during January of 2002, the petitioner submitted only its tax return for the 2000 calendar year. The petitioner submitted no evidence pertinent to its income or assets during 1997, 1998, 1999, or 2001. Further, counsel has not submitted any evidence that the petitioner paid the beneficiary any wages during those years. The petitioner has not demonstrated the ability to pay the proffered wage during the portion of 1997 after the priority date, or during 1998, 1999, or 2001. The petitioner failed, therefore, to demonstrate its continuing ability to pay the proffered wage beginning on the priority date, which is another reason that the petition may not be approved.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.